(3)

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr.A.No. 186 /2001

APPELLANT (In Jail) : Lohra Ram,
S/o Shri Jagdish Cheek,
aged about 45 years,
R/o Village Singarbel, (Sukhawasu Toli) P.S.Kansabel, Teh. Bagicha, Distt. Jashpurnagar, Chhattisgarh.

V E R S U S

RESPONDENT : State of Chhattisgarh, through P.S. Kansabel, Teh. Bagicha, Distt. Jashpurnagar.

OFFENCE UNDER SECTION
302 of I.P.C. 1865

SENTENCE
Rigorous Life Imprisonment with fine of 5000/- Rs. in default of fine further S.I. for 5 years.

(2)

MEMORANDUM OF APPEAL UNDER SECTION 374 OF THE CRIMINAL PROCEDURE CODE, 1973.

Field on 16-2-2001 by Shri L. Gupta Advocate

(782)

R. to AR

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(27)

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मामला क्रमांक Cr. A. No. 186/2001 **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

HIGH COURT OF CHHATTISGARH, BILASPUR

DIVISION BENCH HON. SHRI L.C. BHADOO AND HON. SHRI DHIRENDRA MISHRA, JJ

Criminal appeal no. 186 of 2001

Appellant : Lohra Ram

Versus

Respondent : State of Chhattisgarh

Present

Mr. L.C. Das, counsel for the appellant.
Mr. U.N.S. Deo, Additional Public Prosecutor for the State/respondent.

ORAL JUDGMENT
(14.12.2006)

Per L.C. Bhadoo, J

This appeal is directed against the judgment of conviction and order of sentence dated 23.01.2001 passed by Additional Sessions Judge, Jashpurnagar S.T.No. 199/99 whereby the learned Additional Sessions Judge after holding the accused/appellant guilty under Section 302 of the IPC for

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 2	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

committing the murder of his wife Bihani Bai, sentenced him to undergo imprisonment for life.

2. Case of the prosecution, in brief, is that Bihani Bai herself lodged a report (Ex.P/9) in Police Station – Kansabel on 20th October 1999 at about 7.30 a.m. to the effect that yesterday i.e. 19.10.1999 on the occasion of festival of Dashhara her husband after consuming liquor, started quarreling with his parents, whereupon her father-in-law gave him one lathi blow. Thereafter, the matter was settled and her in-laws went towards the field. In the evening her son and daughter went to Kansabel to watch Dashhara festival. At about 8.00 p.m. when she was sleeping her husband started quarrelling with her saying that why she intervened in the quarrel, sent his parents to the field, in the process, he picked up kerosene lamp, poured kerosene oil on her body and set her on fire, as a result of which she sustained burn injuries on her breast, back, stomach, waist, private parts and legs. Hearing her cries her father-in-law Jagdhish came. He called one neighbour namely Laxman Ghusal, to whom she narrated the incident. At about 11.00 p.m. in the night her son and daughter came back from Kansabel. She informed them about the incident. Since it was night and there was no

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 3	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

conveyance, she could not lodge the report in the night. Based on this report an offence under Section 307 of the IPC was registered against Lohra Ram. Thereafter, the Station House Officer took up the investigation and prepared the site plan (Ex.P/11) of the place of occurrence. Looking to the serious condition of injured Bihani Bai on the directions of S.D.M., Executive Magistrate, Kunkuri recorded the dying declaration (Ex.P/12) of Bihani Bai. She was medically examined by Dr. Shera Toppo (PW-11) who prepared the injury report (Ex.P/13) in which he opined that the superficial burns were about 70% to 80%, burns were grievous in nature. During treatment in the Primary Health Centre, Kansabel, Bihai Bai succumbed to the burn injuries on 3.11.1999. Thereafter, merg intimation (Ex.P/1) was sent to Police Station Kansabel whereupon the offence was converted into Section 302 of the IPC. The investigating officer prepared the inquest report (Ex.P/6) of the dead body of Bihani Bai. Postmortem was conducted by a team of doctors namely Dr. C.D. Bakhla (PW-7) and Smt. V. Bakhla. The doctor opined that cause of death was septicemia due to burn injuries. After usual investigation charge sheet was filed in the Court of Chief Judicial Magistrate, Jashpurnagar who in turn committed the case to the Sessions Judge, Raigarh

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 4	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

from where learned Additional Sessions Judge, Jashpurnagar received the case on transfer for trial.

3. Prosecution in order to establish the charge against the accused examined 11 witnesses. Statement of the accused under Section 313 of the Cr.P.C. was recorded in which he denied the material appearing against him in the prosecution case but he admitted that Bihani Bai had sustained the burn injuries. Two defence witnesses namely Bajruram (DW-1) and Kabulan Malar (DW-2) were produced by the accused in his defence.

4. Learned Additional Sessions Judge, after hearing learned counsel for the respective parties convicted and sentenced the accused as mentioned above.

5. We have heard Mr. L.C. Das, learned counsel appearing on behalf of the accused/appellant and Mr. U.N.S. Deo, learned Additional Public Prosecutor for the State/respondent.

6. The fact that Bihani Bai died on account of burn injuries, has not been disputed. It is also an admitted position that Bihani Bai sustained burn

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 5	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

injuries in her matrimonial house. The defence of the accused is that he did not know as to how his wife Bihani Bai received burn injuries.

7. As far as involvement of the accused in the crime in question is concerned, Mr. L.C. Das, argued that there is nothing on record to show that any medical certificate was obtained by the Executive Magistrate regarding the fitness of mind of Bihani Bai to give statement. He further argued that there is a discrepancy in the time of incident because in the FIR the time of incident has been mentioned as 8.00 p.m. whereas Bihani Bai in her dying declaration has stated that it was 4.00 p.m.

8. On the other hand, Mr. U.N.S. Deo supported the judgment of the trial Court.

9. In this case the conviction rests on the dying declaration of deceased Bihani Bai. As per the settled law before placing reliance on the dying declaration the Court is required to ascertain that the deceased was in a fit mental condition to make dying declaration and had the opportunity to observe and identify the assailant. The Court has to be on guard that the

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 6	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination.

In the matter of **Laxman Vs. State of Maharashtra** reported in **2002(6) SCC 710** the Constitution Bench of the Apex Court held that where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore, the voluntary and truthful nature of the declaration can be established otherwise.

10. Based on the above principle of law we have scrutinized the dying declaration as well as the evidence of PW-10 Ashok Kumar Agrawal, Executive Magistrate who recorded the dying declaration of Bihani Bai. PW-10 Ashok Kumar Agrawal has stated that on 20th October 1999 he was working as Tehsildar, Kunkuri, on the direction of S.D.M. he went to record the dying declaration of Bihani Bai in Mission Hospital. At that time Bihani Bai was in a position to understand and give the statement. He also obtained a certificate of the doctor to this effect. Bihani Bai disclosed to him that she

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश ३	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

was set on fire by her husband after pouring kerosene on her body from a kerosene lamp. The dying declaration of Bihani Bai is Ex.P/12 which bears his signature from 'A' to 'A' portion and thumb impression of Bihani Bai from 'B' to 'B' portion. In his cross-examination he has stated that it is true that he came to know that her husband has set her on fire by pouring kerosene on her body, by the requisition sent to him by the police as also from the disclosure of Bihani Bai. He was orally informed that Bihani Bai is in Govt. Mission Hospital. It is incorrect to say that he did not disclose to anybody the reason of his coming there. Bihani Bai was able to speak Hindi. On his enquiry, she disclosed as to how the incident took place. Perusal of the dying declaration (Ex.P/12) which has been proved by PW-10 Ashok Kumar Agarawa, reveals that Bihani Bai categorically implicated her husband Lohra Ram saying that he set her on fire after pouring kerosene from the kerosene lamp. In the cross-examination of PW-10, the defence has not been able to elicit anything which indicates that Bihani Bai was not in a position to give statement or before her statement was recorded she was subjected to tutoring. The above dying declaration stands corroborated by the fact that Bihani Bai herself lodged the report (Ex.P/9) in the Police Station Kansabel, in which she categorically implicated the accused and stated that her husband Lohra

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश ९	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Ram saying that as to why she intervened in the quarrel between him and his father, quarreled with her, thereafter set her ablaze after pouring kerosene on her body. PW-4 Laxman who immediately came after the incident in her house, has stated that accused was present in the house and except the two there was nobody else. On enquiry from the accused as to how the incident took place, the accused replied he did not know how his wife received burn injuries. Even the accused in his statement under Section 313 of the Cr.P.C. has not explained as to how his wife received burn injuries. Moreover, DW-1 Bajruram has stated that father of deceased Lodhiram came to his house at about 4.00 a.m. in the morning and informed that his daughter has got burnt, whereupon he went along with him to the hospital. The injured (Bihani Bai) was in the Jeep and she was then taken from hospital to police station. He called the Head Constable, before whom Bihani Bai disclosed that her husband Lohra Ram after pouring kerosene oil set her on fire. Therefore, from the above evidence it is established that the accused was present in the house and he has not explained as to how his wife sustained burn injuries. On the contrary, Bihani Bai in her dying declaration before the Executive Magistrate as also in the police station, has categorically held her husband Lohra Ram responsible for setting her on fire after pouring kerosene oil on

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश ३	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

her body. Nothing has come on record to suggest that the wife of accused i.e. deceased Bihani Bai, had any reason to implicate her husband in a false case.

11. Section 106 of Evidence Act, envisages that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In the present case, only the accused and the deceased were in the house where Bihani Bai received burn injuries, therefore, the burden was on the accused to explain as to how Bihani Bai received burn injuries but he has failed to discharge this burden.

12. From the above evidence it is established that the dying declaration made by Bihan Bai was voluntary and true. As has been mentioned earlier that there is nothing on record to show that the dying declaration was subjected to tutoring, we are of the considered opinion that the trial Court has not committed any illegality or infirmity in placing reliance on the above dying declaration of Bihani Bai for convicting the appellant under Section 302 of the IPC.

13. As far as the argument of learned counsel for the accused/appellant that no medical certificate has been placed on record regarding fitness of

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

mind of Bihani Bai at the time of recording her dying declaration, is concerned, it is true that medical certificate has not been placed on record but from the evidence of PW-10 Ashok Kumar Agrawal, it is established that Bihani Bai was in a fit state of mind to give dying declaration. She herself lodged the report in police station. Moreover, Bihani Bai sustained burn injuries on 19.10.1999 whereas she died on 3rd November 1999, as such she was alive for about 14 days, therefore, from this fact it can safely be inferred that Bihani Bai was in a fit state of mind to give dying declaration. Merely non-tendering of medical certificate of the doctor into evidence does not make the prosecution case doubtful.

14. As far as the argument of learned counsel for the accused/appellant that there is variance in the time of incident given in FIR and the dying declaration, is concerned, the time of incident mentioned in FIR is 8.00 p.m. whereas in the dying declaration it is 4.00 p.m., looking to the evidence available on record regarding involvement of the accused in the crime in question as also the fact that Bihani Bai was an illiterate lady of village and that when she gave the dying declaration, she was suffering from pain, much

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

importance can not be attached to the variance in the time of incident between FIR and the dying declaration.

15. For the foregoing reasons, we are of the considered opinion that the finding of trial Court convicting the accused for commission of the offence under Section 302 of the IPC and sentencing him for life imprisonment, does not suffer from any illegality or infirmity.

16. In the result, the appeal being devoid of substance is liable to be dismissed and is accordingly dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
DHIRENDRA MISHRA
Judge

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